SRI SUTERA SDN BHD

v.

MOHAMED ABID AND ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
MOHD NOOR AHMAD JCA
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-870-01]
7 NOVEMBER 2003

CONTRACT: *Agency - Principal and agent - Whether relationship of agency exists - Evidence*

AGENCY: *Liability of agent - Personal liability - Whether agent personally liable on contracts entered into on behalf of principal - Contracts Act 1950, s. 183*

This was an appeal by the 1st and 2nd defendants against the decision of the learned judge allowing the plaintiff's claim against them for moneys owing (share of profits and/or stock in trade) and ordering the deputy registrar to assess damages. It was the 1st defendant's contention that the 2nd defendant was never a director or an agent of the 1st defendant/company, and hence had no authority to contract on behalf of the 1st defendant.

Held (dismissing the 1st defendant's appeal and allowing the 2nd defendant's appeal):
Per Mohd Noor Ahmad JCA

[1] The appointment of an agent need not be in writing; the existence of a principal and agent relationship can be inferred from the circumstances of the case. In the present case, the 2nd defendant was an agent of the 1st defendant - with the authority to bind the latter in contracts and agreements with third persons. (pp 143 b, g & 144 e-f

[2] Pursuant to s. 183 of the Contracts Act 1950, the 2nd defendant could not, as an agent of the 1st defendant, be personally liable on the contracts he entered into on behalf of his principal. (p 145 a-d)

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini adalah rayuan oleh defendan pertama dan kedua terhadap keputusan yang arif hakim kerana membenarkan tuntutan plaintif terhadap mereka berkaitan sejumlah wang terhutang (bahagian keuntungan dan/atau stock in trade) dan seterusnya memerintahkan timbalan pendaftar untuk mentaksirkan gantirugi. Adalah hujah defendan pertama bahawa defendan kedua tidak pernah menjadi pengarah ataupun agen kepada syarikat defendan pertama, dan kerana itu tidak mempunyai autoriti untuk berkontrak bagi pihak defendan pertama.

Diputuskan (menolak rayuan defendan pertama dan membenarkan rayuan defendan kedua):
Oleh Mohd Noor Ahmad HMR

[1] Perlantikan seorang agen tidaklah perlu melalui tulisan; kewujudan hubungan prinsipal dan agen boleh diandaikan dari halkeadaan-halkeadaan kes. Dalam kes semasa, defendan kedua adalah agen defendan pertama - dengan autoriti untuk mengikat pihak terkemudian dalam kontrak dan perjanjian dengan pihak ketiga.

[2] Berdasarkan s. 183 Akta Kontrak 1950, defendan kedua tidak boleh, selaku agen defendan pertama, menjadi bertanggungan secara peribadi atas kontrak-kontrak yang dimeterai bagi pihak prinsipalnya.

Case(s) referred to:
Attorney-General For Ceylon v. AD Silva [1953] AC 461 ***(refd)***
KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***
Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd [1993] 3 CLJ 344 SC ***(refd)***
Plantation Agencies Sdn Bhd v. Hj Ariffin Hj Ismail [1978] 1 MLJ 219 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 183

For the 1st defendant/appellant - S Murthi; M/s S Murthi & Assoc
For the 2nd defendant/appellant - N Ramash; M/s Ramash & Co
For the plaintiff/respondent - Ghazi Ishak (Nordin Sulaiman); M/s Ghazi & Lim

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: S2-22-170-93]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Noor Ahmad JCA:

The defendants appealed against part of the decision of the learned judge who held that the plaintiff had proved his case against them and ordered that damages and quantum be dealt with by the deputy registrar, costs to be paid by the defendants and the defendants' counterclaim be dismissed with costs.

We dismissed the 1st defendant's appeal with costs and ordered the deposit to be paid towards taxed costs. However, we allowed the 2nd defendant's appeal with costs and ordered the deposit to be refunded to him. Here are our reasons.

Briefly, sometime in the middle of 1992, the plaintiff met the 2nd defendant whom he had known for 20 years. The 2nd defendant represented to him that he was a director of the 1st defendant and that he was able to purchase used Mercedes Benz cars from the United Kingdom by using the 1st defendant's Approval Permits (the APs) to import and resell the cars locally for a profit. It was agreed that the 2nd defendant would source for the cars and after notifying the plaintiff, the plaintiff would instruct the 2nd defendant to purchase them with the money to be advanced to the 2nd defendant through the plaintiff's son (PW2) in London. Before the shipment to Malaysia, PW2 would inspect the cars. On arrival, the 2nd defendant would cause the cars to be sold. The profit would be shared between the plaintiff and the 2nd defendant after deducting the plaintiff's advance. Between August and October 1992, the plaintiff had paid a total sum of £87,100 to the 2nd defendant to purchase five cars. All the cars were subsequently shipped to Port Klang with both the defendants named as consignees in the bill of lading. In October 1992, the 1st defendant took possession 2 of the cars and subsequently paid the plaintiff a sum of £31,500 to account for the price of the cars advanced by the plaintiff but failed to pay the plaintiff half of the profit made from the sale. In January 1993, the 1st defendant took possession of the remaining three cars. It was agreed that the three cars would be delivered to the plaintiff. However, the defendants failed to do so.

In the action, the plaintiff claimed against the defendants, *inter alia*, for a specified sum, being half of the profit made from the sale of the two cars and for a quantified sum, being the value of the three cars or alternatively, in respect of the three cars, for their possession.

The 1st defendant denied that the 2nd defendant was its director or agent and therefore had no authority to contract on its behalf. The defendants claimed that they had their own arrangement in that the 1st defendant would purchase used Mercedez Benz cars from the 2nd defendant and for that purpose, the 1st defendant had given the 2nd defendant a deposit of RM250,000 for the

purchase of six such cars. Further, they contended that the 2nd defendant had sold six of the cars to the plaintiff and the five cars claimed by the plaintiff were in fact amongst the six cars sold to the plaintiff.

The learned judge, based on his findings of fact and on credibility, believed the plaintiff's story and rejected the defendants' version.

Before us, learned counsel for the 1st defendant submitted that until 2 December 1992 the plaintiff never met DW1, the managing director of the 1st defendant who was not known to him. There was no evidence before the court that the 2nd defendant was a director of the 1st defendant. Only the 2nd defendant claimed to be so. And further, the 1st defendant never made any representation that the 2nd defendant was its agent and/or director. The representation made by the 2nd defendant cannot bind the 1st defendant. The representation must be made by the 1st defendant. He cited the case of *Attorney-General For Ceylon v. AD Silva* [1953] AC 461 at p. 479 PC in support thereof. With regard to the agreement for the purchase of the car by Tengku Ahmad Faisal (at pp. 609-611 Rekod Rayuan Jilid Dua), it was executed before the plaintiff met DW1 for the first time (25 September 1992). Although the 2nd defendant signed the agreement on behalf of the 1st defendant as a director, the word 'DIRECTOR' and the NRIC no. of the 2nd defendant were written by PW4. The 1st Defendant was not at all involved in the execution of the agreement and the agreement was not shown or made known to DW1 though the deposit under the agreement, in the form of a cheque made to the 1st defendant, was collected by the 2nd defendant and banked into the 1st defendant's account. Therefore, the 2nd defendant had no actual or ostensible authority to bind the 1st defendant in respect of the oral agreement made between the plaintiff and the 2nd defendant. As such, counsel insisted that the learned judge had misdirected himself in holding that the 2nd defendant was an agent of the 1st defendant with authority to bind the 1st defendant. Further, he asserted that although the learned judge did not reject the existence of a separate agreement between the 1st defendant and the 2nd defendant to purchase used Mercedes Benz cars from the United Kingdom, the learned judge failed to take into account the relevant documents and evidence tendered by the 1st defendant to support its case that a deposit of RM250,000 was paid by the 1st defendant to the 2nd defendant for that purpose (re at pp. 601-602 Rekod Rayuan Jilid Dua). Having admitted in evidence, the learned judge erred in rejecting all the evidence relating to the payment of the said deposit of RM250,000 on the ground that it was not pleaded. Lastly, he submitted that the learned judge erred in having accepted the letter dated 2 December 1992 (at p. 623 Rekod Rayuan Jilid Dua) from DW1 to the plaintiff, as evidence of confirmation by the 1st Defendant that the Plaintiff was the rightful owner of the five cars and that all proceeds of sale of the cars were to be paid to

the plaintiff and the ownership of the cars unsold was to be handed over to the plaintiff. Counsel premised his argument on the basis that the letter at best might amount to ratification by the 1st defendant which was not pleaded by the plaintiff.

On the issue of agency, the learned judge concluded that from the evidence he found as a fact that the 2nd defendant was an agent of the 1st defendant with authority to bind the 1st defendant as shown by the fact that he could sign for and on behalf of the 1st defendant in respect of the agreement with the said Tengku Ahmad Faizal. He relied on the authority of *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611, where the court held that the appointment of an agent need not be in writing and that the existence of a relationship of principal and agent can be inferred from the circumstances of the case. He also referred to *Treitel on the Law of Contract* 1995 edn which listed the four conditions that ought to be satisfied before apparent or ostensible authority arises and concluded that the facts clearly showed all the conditions had been satisfied. In arriving at such conclusion, he also took into account of the fact that (i) the 2nd defendant had admitted to the plaintiff that he was a director of the 1st defendant, (ii) when the plaintiff first met DW1 concerning his claim to the cars DW1 did not dispute the representation that the 2nd defendant was a director of the 1st defendant, (iii) DW1 signed the letter of confirmation as stated in para. 4 above, and (iv) the plaintiff and PW2 believed that the 2nd defendant was acting as the agent of the 1st defendant because they believed that as an individual the 2nd defendant would not have been able to obtain more than one AP, as deposed without challenge.

A scrutiny of the judgment will reveal that the learned judge came to his findings and conclusions on the issue of agency based on the totality of the evidence adduced, that is to say, the combined effect of the events that took place from the time when the oral agreement was concluded between the plaintiff and the 2nd defendant in the middle of 1992 until 2 December 1992 when the letter of confirmation was issued by DW1 to the plaintiff. We are satisfied with the approach taken by the learned judge in considering the issue.

The learned judge rejected all the evidence relating to the purported payment of RM250,000 deposit by the 1st defendant to the 2nd defendant because it was not pleaded. Had that been the defendants' case, their solicitors would have been instructed to plead the material facts or to amend their pleadings at the trial for the purpose. However, the learned judge did not reject the existence of a separate agreement between the 1st defendant and the 2nd defendant whereby the former, as an importer of cars from London, would buy the cars from the latter because obviously it was pleaded (see para. 13(a) of the statement of defence and counterclaim of the 1st defendant at p. 47 Rekod Rayuan Jilid Satu).

We are of the view that the learned judge was right in law and in fact in making the selective approach. The payment of deposit is concerned with pleadings and because the material matter was not pleaded, trite law demands that it should be rejected. And whereas the existence of the separate agreement between the 1st defendant and the 2nd defendant is related to admissibility; and if it is pleaded and admissible in evidence the court has to consider it which may not necessarily be favourable to the party adducing it. However, in this case the learned judge on the totality of the evidence and credibility, though did not reject it, had rendered it in obscurity when he used it as one of the reasons for rejecting DW1's claim that the letter of confirmation dated 2 December 1992 was issued by him not voluntarily, by misrepresentation on the part of the plaintiff and under threat. On this point the learned judge said:

> If the contents of these two documents are intended to speak for themselves and if they are true of their contents, then I see no reason why DW1 had signed CABD 74 nor allow himself to be subjected to threats by the Plaintiff.

In respect of the letter of confirmation, the learned judge held that its contents must be deemed to be agreed and admitted because it was put into the CABD without any challenge and pursuant to his direction. He found that neither DW1 nor the defendants had satisfied him, upon the basis of s. 103 of the Evidence Act 1950, that it ought to be rejected. Therefore, he considered it and used it as one of the basis for holding that the 2nd defendant was an agent of the 1st defendant with authority to bind the 1st defendant.

We agree with the stand taken by the learned judge in dealing with the evidence. As it was admitted in evidence including its contents he was entitled to consider it in the manner as he did. He did not consider it as ratification because ratification was not the issue before him but he considered the letter and its contents as one of the factors in his determination whether the 2nd defendant was the agent of the 1st defendant with authority to bind the 1st defendant. Ratification was surmised by learned counsel only in his submission. With due respect, we do not agree with him.

Therefore, for the aforesaid reasons, we decline to interfere with the conclusions of the learned judge based on the findings of fact and on credibility.

Now, on the appeal by the 2nd defendant learned counsel submitted that by virtue of the provisions of s. 183 of the Contracts Act 1950, the 2nd defendant being the agent of the 1st defendant, could not be personally liable on contract entered into by him on behalf of the 1st defendant. He cited a host of authorities, including *Plantation Agencies Sdn Bhd v. Haji Ariffin bin Haji Ismail* [1978] 1 MLJ 219 FC and *Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd* [1993] 3 CLJ 344 SC in support thereof.

Section 183 reads:

> Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:

Presumption of contract to contrary.

(a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(b) where the agent does not disclose the name of his principal; and

(c) where the principal, though disclosed, cannot be sued.

We agree with learned counsel. The facts do not call for our consideration on the presumption of contract to the contrary.